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IN THE

Supreme Court of the United States

October Term, 1963

No. 273

JOHN M. KOSSICK,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, John M. Kossick, prays that a writ of certiorari issue to review the judgment and decision of the United States Circuit Court of Appeals for the Second Circuit, entered on the 15th day of April, 1964.

Opinions Below

The opinion of the United States District Court for the Southern District of New York (Hon. Edward C. McLean, D. J.) is not reported and is printed in the record below at p. 2a.

The opinion of the Court of Appeals, dated April 15, 1964, is reported at 330 F. 2d 933 (1964), and is appended hereto, *infra*, p. 2a.

Jurisdiction

The judgment sought to be reviewed is dated April 15, 1964 and was entered April 15, 1964.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Presented

1. Is it not an unconstitutional denial of the equal protection of the law to deny a Federal Tort Claims Act cause of action on the basis of non-applicable federal decisions, when the Federal Tort Claims Act makes state law the controlling law, and such applicable state law would validate the cause of action?

2. When federal law grants remedial legislation to be applied in accordance with State law, is it error for the federal courts to rely on federal decisions in conflict with State decisions, in interpreting the rights and remedies of a litigant asserting a claim based on such federal law?

Laws Involved

Amendment V, U. S. Constitution (Appendix, p. 8a).

28 U. S. C. 1346 (2)(b) (Appendix, p. 8a).

28 U. S. C. 2401(b) (Appendix, p. 9a).

28 U. S. C. 2671 (Appendix, p. 9a).

28 U. S. C. 2674 (Appendix, p. 10a).

Reasons for Granting the Writ

The decision by the Court below constitutes a denial of the remedial rights and remedies provided by federal statute, the Federal Tort Claims Act, 28 U. S. C.

1346(2)(b), and an unconstitutional denial of due process guaranteed by the Fifth Amendment.

The decision by the Court below is in conflict with the decision in the case of *Richards* v. *United States*, 369 U. S. 1, 82 S. Ct. 585 (1962).

The decision by the Court below emasculates so much of the provisions of the Federal Tort Claims Act, *supra*, as provides for the application of State law, as enunciated by the New York Court of Appeals in the case of *Borgia* v. *The City of New York*, 12 N. Y. 2d 151, 237 N. Y. S. 2d 319, so that the benefits of State law, provided by the Federal Tort Claims Act, *supra*, are rendered substantially ineffectual and meaningless and are denied to petitioner.

Petitioner is thereby denied the equal protection of the law in violation of constitutional rules.

The expediency of time and volume of court cases has no place in our American concept of justice when considering legal substantial and substantive rights of an American citizen, and the decision by the Court below which emphasizes time and procedure as outweighing the merits of a cause of action, constitutes a radical departure from uniform and well established laws enunciated by this Court in *Caldarola* v. *Eckert*, 332 U. S. 155, 67 S. Ct. 1569 and *Pope & Talbot Inc.* v. *Hawn*, 346 U. S. 406, 74 S. Ct. 202.

Federal statute having established State law as the basis for liability, there is no justification for invoking federal concepts of law to destroy rights which a litigant would have on the basis of State law.

Statement

District Court jurisdiction was based on 28 U. S. C. 1346 (2)(b).

Petitioner was concededly admitted to the United States Public Health Service Hospital at Staten Island, New

York, in August, 1950, and was given an injection of potassium iodide, which resulted in serious internal burns destroying the rectum and a great deal of his digestive tract, injuries concededly caused by malpractice of the respondent.

The hospital record states that this injection was "inadvertently" given.

A left colostomy was performed. This was not successful. Thereafter, a right colostomy was performed. After the right colostomy, prurient drainage developed around the left colostomy site.

There was considerable surgical work, including dissections of portions of the bowels and a series of dilation operations, which are not concluded as yet.

The petitioner is still under treatment by respondent for the after-effects of the malpractice.

Petitioner duly and timely filed a complaint in accordance with applicable New York State law, as authorized by remedial federal statute, The Federal Tort Claims Act, 28 U. S. C. A. §§ 1346 (2) (b) and 2673.

Respondent interposed, as part of its defense, the statute of limitations, 28 U. S. C. A. § 2401(b).

Petitioner moved to strike the defense based on the statute of limitations as not being applicable to the New York State law which constituted the basis of petitioner's cause of action.

The District Court erroneously refused to be governed by applicable New York State law and dismissed the complaint, on respondent's cross motion.

Petitioner appealed to the United States Court of Appeals for the Second Circuit, which affirmed the decision of the Court below.

Respondent did not make a full disclosure of the fact that it was still under a legal duty to provide petitioner

with continuing treatment and that the relationship of patient and doctor had never been terminated since the surgery.

Petitioner was not in a position at the time of the motion to submit "proof by respondent's attending doctor", but his affidavit alleging that he was still under treatment by respondent established an issue of fact, which the Court below erroneously disregarded.

Argument

Petitioner has predicated his cause of action on the Federal Tort Claims Act, 28 U. S. C. A. §§ 1346 (2)(b) and 2671, *et seq.*, which provides that the law of the forum shall control. The law of the forum is clearly set forth in *Richards* v. *U. S.*, 369 U. S. 1, 82 S. Ct. 585 (1962), wherein the entire law of the state is made applicable.

The Court of Appeals, in an opinion by Chief Judge Desmond, decided December 31, 1962, in the case of *Borgia* v. *The City of New York*,[1] 237 N. Y. S. 2d 319, 12 N. Y. 2d 151, stated:

> "* * * a number of decisions at least five of which plainly say that where there has been continuing treatment time limitation does not start until treatment ends (Schanil v. Branton, 181 Minn. 381, 382, 232 N. W. 708; De Haan v. Winter, 258 Mich. 293, 296-297, 241 N. W. 926; Williams v. Elias, 140 Neb. 656, 600, 1 N. W. 2d 121; Peteler v. Robinson, 81 Utah 535, 546, 17 P. 2d 244; Sly v. Van Lengen, 120 Misc. 420, 198 N. Y. S. 608)."

[1] The very nature of the post-operative condition is such that expert opinion was completely unnecessary in presenting the fact that the relationship of physician and patient had not been terminated, as the question involved post-operative treatment for "colostomys" which condition, as a matter of common knowledge, requires intermittent treatment during the entire life of the patient, for this permanent and progressive type of injury.

IT IS A MATTER FOR JUDICIAL NOTICE THAT A SEAMAN'S STATUS AS A PATIENT OF THE UNITED STATES PUBLIC HEALTH SERVICE IS NEVER TERMINATED, SO LONG AS HE REQUIRES TREATMENT FOR A MARITIME SERVICE-CONNECTED CONDITION.

Ordinarily, petitioner would move for reargument in the District Court upon receipt of the letter by Dr. Love establishing petitioner's contention set forth in his affidavit that the relationship of doctor and patient had not terminated, but in the light of the decision by the Court below rejecting the holding in the *Borgia* case, *supra*, as controlling, the only logical procedure is to petition this Court for review in accordance with the questions presented.

The respondent, being charged with possession of knowledge of the fact that one of its doctors, Dr. Love, was still treating petitioner as an outpatient at respondent's hospital, should not be permitted to benefit by withholding such information from the District Court in the first instance, nor should petitioner have been denied, by the Court below, the opportunity to present further proof that he was still under treatment by respondent.

Petitioner claims that the question of time and expediency was given unwarranted and erroneous weight by the Court below.

The respondent being the United States of America, it is submitted that even this appellate Court may take judicial notice of the public records establishing the fact that petitioner is still a patient receiving continued and continuous intermittent treatment from the respondent at its Public Health Service Hospitals.

POINT I

The action has been timely brought.

28 U. S. C. A. § 2401 (b) is governed by New York State law as to the time when a "claim accrues."

The *Federal Tort Claims Act*, 28 U. S. C. A. § 2674, provides:

> "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstnces * * *".

All of the cases, without exception, cited by the Court below, fails in every instance, to encompass the question before the Court, as will be pointed out hereafter by direct reference to each case.

POINT II

Not only did the Court below completely ignore the controlling decision by this Court, as set forth in *Richards* v. *United States*, 369 U. S. 1, 82 S. Ct. 585 (1962), as to petitioner's rights, but erroneously adopted a radical departure from the holding in said case.

The Cases Relied on by the Court Below Are Not Controlling

The case of *Quinton* v. *United States*, 304 F. 2d 234 (5th Cir. 1962) supports appellant's position and is in conflict with the legal proposition for which it was cited by the Court below.

In *Quinton, supra*, in reversing the lower Court which had dismissed the malpractice action against the United States, the Appellate Court stated at page 238:

> "The simple fact is that state law respecting the accrual of a particular claim cannot be divorced from

> the state law fixing the period after accrual within which the plaintiff can bring suit on the accrued claim."

Only when a State statute of limitation tends to shorten the time allowed by Congress within which to invoke the provisions of remedial legislation, then and only then, is federal concept invoked, but never as to the existence or accrual of a tort claim.

The decision in the case of *Hungerford* v. *United States*, 307 F. 2d 99 (9th Cir. 1962), rested on the decision in the case of *Bizer* v. *United States*, 124 F. Supp. 949 (N. D. Calif. S. D. 1954).

In the case of *Tessier* v. *United States*, 269 F. 2d 305, the scholarly and detailed review of the applicable law by Circuit Judge Magruder demonstrates that State law controls the question of the statute of limitations.

POINT III

The New York State law determines the substantive rights and the Federal law determines the procedural rights of the parties hereto.

In the case of *Foote* v. *Public Housing Commissioner of the United States*, 107 F. Supp. 270 (W. D. Mich. S. D. 1952), the Court said at page 273:

> "* * * the standards and tests of local State law are applicable in determining whether an actionable negligent or wrongful act has been committed, and the nature and extent of the recovery permitted."

The Federal Tort Claims Act provides that the cause of action shall be established on the basis of State law.

The statute of limitations is an affirmative defense, which does not begin to run until the relationship of physician and patient is terminated.

This relationship has never been terminated in the case at bar.

This principle of law was enunciated as early as March 8, 1923 in the case of *Sly* v. *Van Lengen,* 198 N. Y. S. 668, and re-asserted as recently as December 31, 1962 in the case of *Borgia* v. *City of New York, supra.*

The fact cannot be denied that the course of treatment has to run continuously and is related to the acts of malpractice complained of.

Chief Judge Desmond, speaking for the Court in *Borgia, supra,* stated at page 321:

> "We hold that at least when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint, the 'accrual' comes only at the end of the treatment.
>
> [1] Preliminarily, we note that the same rule must be applied whether we are passing on a true Statute of Limitations problem (Civil Practice Act, § 49, subd. 6; § 50, subd. 2) or a section 50-e dispute. The question is the same: when did the claim or cause of action 'accrue'? This court has never had to decide whether in the case of continuous treatment 'accrual' is postponed until treatment ends, but in Hammer v. Rosen, 7 N. Y. 2d 376, 379, 198 N. Y. S. 2d 65, 66, 165 N. E. 2d 756, 757 [1960] we forecast an affirmative answer. Hammer v. Rosen is not an actual application of the 'continuous treatment' rule since in that case there was within the two years not only treatment but malpractice. But the Hammer-Rosen opinion referred (p. 380, 198 N. Y. S. 2d p. 67, 165 N. E. 2d p. 757) to 'a continuing course of psychiatric treatment' and, more significantly, cited with approval a number of decisions at least five of which plainly say that where there has been continuing treatment time limitation does not start until treatment ends (Schanil v. Branton, 181 Minn. 381, 382, 232 N. W. 708; De Haan v. Winter, 258 Mich. 293, 296-297, 241 N. W. 926; Williams v. Elias, 140 Neb. 656, 660, 1 N. W. 2d 121; Peteler v. Robin-

son, 81 Utah 535, 546, 17 P. 2d 244; Sly v. Van Lengen, 120 Misc. 420, 198 N. Y. S. 608)."

The time for the running of the statute of limitations has not as yet commenced.

In the case of *McNamara* v. *United States*, 199 F. Supp. 879 (1961), at page 881, under [7, 8], the Court stated:

> "Under the Federal Tort Claims Act the Government is liable in the same manner and to the same extent as would be a private individual under like circumstances. The substantive rights of the plaintiff and of the defendant in such a case must be measured by the law of the state in which the cause of action arose. In this instance, it is the District of Columbia. Consequently, the tort law of the District of Columbia governs the plaintiffs' rights and the defendant's liabilities."

In the case of *Bank of America Nat. T. & S. Ass'n* v. *Parnell*, 77 S. Ct. 119, 352 U. S. 29 (1956), the United States Supreme Court stated at page 122, under [4]:

> "The Court of Appeals has not decided what the governing state law on burden of proof is, and it is the court which should so decide. Likewise, if state law casts the burden on respondents to demonstrate their good faith, it is for the Court of Appeals to assess the evidence in light of that standard."

In the case of *Hooten* v. *Civil Air Patrol*, 161 F. Supp. 478 (1958), the Court stated at page 482 under [12, 13]:

> "The Federal Tort Claims Act is governed by the law of the state of the alleged tort. If no cause of action exists in such state, no action exists under the Federal Tort Claims Act. If the cause of action is limited or circumscribed by state law, the same limitation and circumscription apply under the Federal Tort Claims Act."

In the case of *United States* v. *Sharpe*, 189 F. 2d 239 (1951), the Court stated at page 241 under [3]:

> "We look to the local law for the purpose of determining whether the act with which he is charged gives rise to liability. The Tort Claims Act adopts the local law for the purpose of defining tort liability • • • "

In the case at bar, the malpractice not only caused a condition that could not be rectified, but a condition that started a chain of accumulative events which in and of themselves, being directly related to the original malpractice, required recurrent and continual treatment.

In the case of *United States* v. *Reid*, 251 F. 2d 691 (1958), the Court stated at page 695:

> "The claim was not for initial tuberculosis. It was that faulty medical advice interfered with proper tests and treatment. Obviously the acceleration of an existing condition into one of an aggravated state was 'the product of a period of time rather than a point of time; consequently the afflicted employee can be held to be "injured" only when the accumulated effects of the deleterious substance manifest themselves.' Urie v. Thompson, supra, 337 U. S. 163, 69 S. Ct. 1025, 93 L. Ed. at page 1293."

In considering the effect of statutes of limitations of the various states which tend to cut down the rights of a litigant, the Court stated in the case of *State of Maryland* v. *United States*, 165 F. 2d 869 (1947) at pages 872, 873:

> "Finally, the effects and consequences of holding state statutes of limitations applicable should be considered; for it is well settled 'that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion.'
>
> • • •
>
> "And we think it makes no difference that the limitation applicable to the action for death by wrongful act is held under state law to be a condition on the exercise of the right rather than a limitation

> on the remedy. This holding is based upon the narrow ground that the limitation is imposed by the statute creating the cause of action [2] and is, to say the best of it, technical and legalistic reasoning, which is not followed in all the states. Cf. State of Maryland for use of Dunnigan v. Cobourn, 171 Md. 23, 187 A. 881, 107 A. L. R. 1045; Sharrow v. Inland Lines, 214 N. Y. 101, 108 N. E. 217, L. R. A. 1915 E. 1192, Ann. Cas. 1916D, 1236, and cases cited in note in 67 A. L. R. 1071."

In the case of *Richards* v. *United States*, 82 S. Ct. 585, 369 U. S. 1 (1962), the Supreme Court apparently had in mind the confusion that exists in some of our district courts, a good part of which was reflected in the brief of counsel for defendant-appellee, when he commented upon the divergence from the fundamental principles long established in the conflict of laws that substantive law is determined by the local court and procedural by the forum. That same confusion still permeated the opinion of the Circuit Court in this case.

In the *Richards* case, *supra*, the Court stated at pages 592-593:

> "Recently there has been a tendency on the part of some States to depart from the general conflicts rule in order to take into account the interests of the State having significant contact with the parties to the litigation.[26] We can see no compelling reason to saddle the Act with an interpretation that would prevent the federal courts from implementing this policy in choice-of-law rules where the State in which the negligence occurred has adopted it."

The Court, in the *Richards* case, *supra*, apparently has set at rest for all time the question of what Court shall determine the substantive law and what Court shall determine the procedural law. The Court stated at pages 591, 592:

> "[4, 5] In the Tort Claims Act Congress has expressly stated that the Government's liability is

to be determined by the application of a particular law, the law of the place where the act or omission occurred,[19] and we must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used. We believe that it would be difficult to conceive of any more precise language Congress could have used to command application of the law of the place where the negligence occurred than the words it did employ in the Tort Claims Act."

* * *

"We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act,[21] and that in fulfilling our responsibiilty in interpreting legislation, 'we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy.'[22] We should not assume that Congress intended to set the courts completely adrift from state law with regard to questions for which it has not provided a specific and definite answer in an act such as the one before us which, as we have indicated, is so intimately related to state law. Thus, we conclude that a reading of the statute, as a whole, with due regard to its purpose, requires application of the whole law of the State where the act or omission occurred."

POINT IV

A cause of action is a property right protected by constitutional rules.

Gibbes v. *Zimmerman*, 290 U. S. 326, 332, 54 S. Ct. 140, 142;

Pritchard v. *Norton*, 106 U. S. 124, 132, 1 S. Ct. 102.

POINT V

Judicial denial of an available remedy is denial of the equal protection of the law and violates the due process provisions of the Fifth Amendment.

In *Irvin* v. *Dowd*, 359 U. S. 394, 404, 79 S. Ct. 825, 831, this Court held that:

> "'* * * the state courts, equally with the courts of the Union, * * * (have an obligation) to guard, enforce, and protect every right granted or secured by the Constitution of the United States * * *.' Robb v. Connolly, 111 U. S. 624, 637, 4 S. Ct. 544, 551, 28 L. Ed. 542."

Clearly, therefore, judicial denial of an available remedy violates due process.

Conclusion

It is respectfully urged that a substantial federal question is presented herein and that there is herein an important question of the remedial rights of a seaman, and the uniform application of the law of the *Richards* case, such that merits consideration and review by this Honorable Court, which affirmed the District Court holding in *Aero Design* v. *Oklahoma*, 151 F. S. 844 (aff'd — U. S. —, 77 S. Ct. 824), that a litigant's day in court includes the right to be heard in the court of last resort on constitutional questions.

Wherefore petitioner respectfully submits that the writ ought to issue so that the judgment below may be reviewed and reversed.

Respectfully submitted,

JACOB RASSNER,
Counsel for Petitioner.

APPENDIX

Judgment Sought to Be Reviewed

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse on the fifteenth day of April One thousand nine hundred and sixty-four.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,
HON. STERRY R. WATERMAN,
HON. HENRY J. FRIENDLY,
Circuit Judges.

JOHN M. KOSSICK,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This Cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to appellee.

A. DANIEL FUSARO,
Clerk.

Circuit Court Opinion

FRIENDLY, Circuit Judge:

This case, like Kossick v. United Fruit Co., 275 F. 2d 500 (2 Cir. 1960), rev'd 365 U. S. 731, 81 S. Ct. 886. 6 L. Ed. 2d 56 (1961), concerns a serious rectal injury inflicted upon Kossick, a seaman, in August 1950, in the United States Public Health Service Hospital at Staten Island, N. Y., by the administration of a post-operative enema containing a grossly excessive dosage of potassium iodide. The injury required much further surgery, and Kossick remained in the Hospital under treatment until April 3, 1951. He was at sea from late June to early November, 1951, when he was readmitted to the Hospital. During the next year he spent considerable time in the Hospital, some of this involving surgery, until November 10, 1952, when he was discharged as "fit for duty" with the admonition that he would have to take a laxative for the rest of his life. Since then he has made occasional visits to the Hospital or the Public Health Service outpatient clinic.

The instant action against the United States in the District Court for the Southern District of New York for negligence of the doctors and nurses at the Hospital was not begun until April 4, 1963. The appeal is from an order granting the Government's motion for summary judgment under 28 U. S. C. § 2401 (b) providing that "A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues • • •." To avoid the apparent time bar Kossick relies on combining 28 U. S. C. § 2674, the basic provision in the Tort Claims Act making the United States liable "in the same manner and to the same extent as a private individual under like circumstances," with New York decisions, particularly Borgia v. City of New York, 12 N. Y. 2d 151, 237 N. Y. S. 2d 319, 187 N. E. 2d 777 (1962), that a claim for malpractice does not "accrue" so long as the plaintiff is

under continuous treatment for the ailment as to which the malpractice occurred or for the mappractice itself.[1]

In Tessier v. United States, 269 F. 2d 305, 309 (1 Cir. 1959), also under the Federal Tort Claims Act, Judge Magruder held that a claim accrues "when it may be made the basis of a judicial action"; that the effect of § 2674 was to refer that issue to the law of the state where the injury occurred; and that since Maine, the place of the injury, would have recognized a legal wrong to Tessier when needle fragments were lodged in his body in the course of an appendectomy, his right of action accrued at that time even though he did not experience pain until the next year and its cause was not established until seven years later, less than two years before the action was brought. A similar situation, where the malpractice was not discovered until more than two years after the injury, came before the Fifth Circuit in Quinton v. United States, 304 F. 2d 234 (1962). In a powerfully reasoned opinion for Judge Wisdom and himself, Chief Judge Tuttle explained what bizarre and indefensible results would be produced by referring to state law to determine the beginning of the two year period of § 2401(b) since the states have resorted to dissimilar devices to guard against unfair operation of statutes of limitations in tort cases, 304 F. 2d at 238; he concluded "that federal law determines when the period of limitations contained in Section 2401(b) commences to run [i.e., federal law determines when a 'claim accrues' within the meaning of Section 2401(b)], even though we look to state law to determine whether any claim has accrued against the Government which would enable the claimant to sue under the Tort Claims Act. In other words, we look to state law to deter-

[1] In fact the Borgia case related to § 50-e of the General Municipal Law, McKinney's Consol. Laws, c. 24 requiring notice of a claim to be filed against a city within 90 days after the claim accrued. But the Court of Appeals made clear that it would apply the same rule if it were "passing on a true Statute of Limitations problem * * *." 12 N. Y. 2d at 155, 237 N. Y. S. 2d at 321.

mine whether the plaintiff's action is premature, but to federal law to determine whether the action is stale." Judge Hutcheson concurred on the ground "that Section 2401(b) is not a statute of limitations, within the legal definition of that term [citing cases]; but that it imposes as a jurisdictional prerequisite to recovery, a substantive condition, qualification, or restriction on both the right and remedy of the plaintiff and on the suability of the United States"; on such an issue "state limitations statutes and decisions with respect to them are seen to be without bearing or relevance." 304 F. 2d at 242. The Ninth Circuit has followed Quinton, one judge dissenting. Hungerford v. United States, 307 F. 2d 99 (1962).

[1, 2] We are persuaded of the correctness of the Quinton decision. Whether § 2401(b) is regarded as a "true" statute of limitations or as "a direct limitation to the court's jurisdiction" as we have characterized "the built-in time-bar of the Suits in Admiralty Act," 46 U. S. C. § 745, American Foreign SS. Corp. v. United States, 291 F. 2d 598, 604 (2 Cir.), cert. denied, 368 U. S. 895, 82 S. Ct. 171, 7 L. Ed. 2d 92 (1961), a position supported directly by Simon v. United States, 244 F. 2d 703 (5 Cir. 1957), and inferentially by Soriano v. United States, 352 U. S. 270, 275, 77 S. Ct. 269, 1 L. Ed. 2d 306 (1957), see also States Marine Corp. of Del. v. United States, 283 F. 2d 776 (2 Cir. 1960),[2] the policy behind it as a federal policy. Cf. Westinghouse Elec. Corp. v. Pacific Gas & Elec. Co., 326 F. 2d 575, 579 (9 Cir. 1964). Just as it would be inimical to the design of Congress to allow the beneficent purposes

[2] Section 2401(b) derives from Section 420 of the Federal Tort Claims Act, 60 Stat. 842; 845 (1946), which barred a claim unless action was begun within one year. The period was increased to two years by 63 Stat. 62 (1949). The relationship was obscured by the rearrangement in the 1948 Judicial Code, but we have been wisely instructed not to consider such changes as significant. Fourco Glass Co. v. Transmirra Prod. Corp., 353 U. S. 222, 227-228, 77 S. Ct. 787, 1 L. Ed. 2d 786 (1957).

of the Tort Claims Act to be frustrated by state rules that a claim for malpractice "accrued" before it could even be known, as the Quinton and Hungerford cases held, it would be equally inimical to allow a state rule postponing "accrual" far beyond any necessities of the case to subject the United States to the stale claims which the prescription of the short two-year period was intended to avoid. The general language of § 2674 must yield to the specific provisions of § 2401 dealing with time limitations, as it recognized when a state period of limitations is shorter than the period specified in the Tort Claims Act. Maryland to use of Burkhardt v. United States, 165 F. 2d 869 (4 Cir. 1947); Young v. United States, 184 F. 2d 587 (D. C. Cir. 1950); United States v. Westfall, 197 F. 2d 765 (9 Cir. 1952). Even if we assume *arguendo* that § 2674 has some application to time problems, we give it sufficient force by construing it to allow the United States to object that a suit is premature under applicable state law.

[3] Here Kossick must have discovered the grievous injury inflicted upon him very shortly after the administration of the enema on August 29, 1950. Although he could have begun a suit at that time, we do not say that for purposes of § 2401(b) the two-year period began to run so soon. Courts have long since rejected the mechanical concept that in all cases the limitations period necessarily starts the very moment that a suit can be brought. See Note, Developments in the Law—Statutes of Limitations, 63 Harv. L. Rev. 1177, 1200, 1204, 1213-19 (1950). There is much good sense in Chief Judge Desmond's observation in the Borgia case that "It would be absurd to require a wronged patient to interrupt corrective efforts by serving a summons on the physician or hospital superintendent • • •" 12 N. Y. 2d at 156, 237 N. Y. S. 2d at 321-322, and this is not altogether without application when as here the summons would be served on the United States Attorney. F. R. Civ. Proc. 4(d) (4). But the period when such considerations remained pertinent expired at the latest when

Kossick was discharged after the last surgical attention to his injury in November 1952 and nothing more in the way of remedy could be accomplished. It would be unreasonable to postpone the beginning of the limitation period so long as Kossick exercised his statutory right to demand further treatment at the Hospital, 42 U. S. C. § 249—a period that will never expire so long as he is a seaman.

[4, 5] We add that we seriously doubt whether in applying the New York two year statute of limitations for malpractice, § 50(1) of the Civil Practice Act and § 214(6) of the new Civil Practice Law and Rules, the New York courts would reach any different result in a case like Kossick's. None of the New York "continuous treatment" cases that have been cited to us presented the question whether merely occasional hospital visits at substantial intervals, and these for examination or minor treatment to alleviate sequelae of the injury rather than for further cure, would prevent accrual of the claim.[3] On the facts before the District Court, Kossick's case did not rise even to that level; the affidavits on the Government's motion for summary judgment served July 3, 1963, showed that the last of Kossick's visits to the Hospital, in February, 1961, more than two years before suit, was brief and was an examination only, and that subsequent visits to a Public Health Service outpatient clinic in Brooklyn were for ailments unconnected with the malpractice. These later visits plainly would not qualify under the Borgia doctrine, 12 N. Y. 2d at 157, 237 N. Y. S. 2d at 322. At the argument in this court appellant's counsel sought to have us consider, or remand for the District Court to consider, a letter

[3] Gross v. Wise, 18 A. D. 1097, 239 N. Y. S. 2d 954 (1963) and Armstrong v. City of New York, 39 Misc. 2d 445, 240 N. Y. S. 2d 663 (Sup. Ct. 1963) are not determinative since in the former the patient was treated on thirty-nine occasions over a period of less than three years, and in the latter, under § 50-e of the General Municipal Law, the patient continued to be treated after her discharge from the hospital until her death eight days later.

dated November 29, 1963, from the Chief of the Surgical Service of the Public Health Service Hospital in Boston enclosing papers recording that Kossick had been there from July 16 to July 24, 1963—a record which, of course, was available long before Judge McLean's decision on October 10. But, even if we were to take that extraordinary course, the Boston record shows only a thorough examination, after a long interval, which we doubt would qualify under the Borgia doctrine. In any event, under our view that determination of the start of the two-year period under 28 U. S. C. § 2401(b) is an issue of federal law, we regard it as insufficient to postpone this.

Affirmed.

Laws Involved

Fifth Amendment—United States Constitution.

AMENDMENT [V]

No person shall be * * * deprived of * * * property, without due process of law; * * *

28 U. S. C. § 1254 (1):

§ 1254. COURTS OF APPEALS; CERTIORARI; APPEAL; CERTIFIED QUESTIONS

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree:

28 U. S. C. § 1346 (2) (b):

(b) Subject to the provisions of Chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U. S. C. § 2401 (b):

§ 2401. Time for Commencing Action Against United States

• • •

(b) A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later, or unless, if it is a claim not exceeding $2,500. It is presented in writing to the appropriate Federal agency within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later. If a claim not exceeding $2,500 has been presented in writing to the appropriate Federal agency within that period of time, suit thereon shall not be barred until the expiration of a period of six months after either the date of withdrawal of such claim from the agency or the date of mailing notice by the agency of final disposition of the claim.

28 U. S. C. § 2671:

§ 2671. Definitions

As used in this chapter and sections 1346 (b) and 2401 (b) of this title the term—

"Federal agency" includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty.

28 U. S. C. § 2674:

§ 2674. Liability of United States.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively for whose benefit the action was brought in lieu thereof.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 273

JOHN M. KOSSICK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court is reported at 223 F. Supp. 720. The opinion of the court of appeals (Pet. App. 2a) is reported at 330 F. 2d 933.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1964 (Pet. App. 1a). The petition for a writ of certiorari was filed on July 14, 1964. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's claim under the Federal Tort Claims Act was barred by the statute of limitations.

STATUTE INVOLVED

The pertinent provision of the Federal Tort Claims Act, 28 U.S.C. 2401(b), is set forth at page 9a of the petition.

STATEMENT

In his complaint, petitioner alleged that, in August 1950, while a patient at a United States Public Health Service Hospital in New York, he was the victim of medical malpractice (Pet. App. 2a). His course of treatment for the resulting injury continued through November 10, 1952, when he was discharged as fit for duty, and intermittently thereafter until February 1961.[1] This action, for the 1950 negligence of the doctors and nurses at the hospital, was not begun until April 4, 1963 (Pet. App. 2a).

The district court granted summary judgment for the United States, ruling that petitioner's action was barred by the two-year period of limitations provided in 28 U.S.C. 2401(b) (Pet. App. 2a). The court held (223 F. Supp. at 721) that federal law governs

[1] Petitioner's later visits to a Public Health Service outpatient clinic were for ailments unconnected with the malpractice (Pet. App. 6a).

and that the federal rule is that a claim accrues when the plaintiff discovers, or reasonably should discover, the acts giving rise to the claim.[2] The court noted (223 F. Supp. at 720) that, under the admitted facts in the case, petitioner was not only aware of the malpractice and of the nature and causes of his injuries at least as early as the Spring of 1951, but even then consulted an attorney about beginning an action to recover for the injuries.

The court of appeals affirmed, agreeing that federal law determines when a claim accrues within the meaning of section 2401(b) (Pet. App. 4a). However, the court also noted that, even under the law of New York, with its rule that a claim for malpractice does not accrue so long as the plaintiff is under "continuous treatment" for the ailment as to which the malpractice occurred, petitioner's action would still be untimely since the record showed that the last visit for treatment of his injury occurred more than two years before this suit (Pet. App. 6a).

ARGUMENT

This case does not warrant furthe review. Although there is a conflict between the circuits as to whether State or federal law determines when an action accrues within the meaning of 28 U.S.C. 2401 (b), the court below correctly ruled that petitioner's action was untimely under either view.

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[2] *Quinton* v. *United States*, 304 F. 2d 234 (C.A. 5); *Hungerford* v. *United States*, 307 F. 2d 99 (C.A. 9). *Contra*, *Bizer* v. *United States*, 124 F. Supp. 949 (N.D. Calif.).

1. The court below followed the decisions of the Fifth and Ninth Circuits[3] and held that federal, rather than State, law determines *when* a tort claim against the United States accrues within the meaning of 28 U.S.C. 2401(b), even though (see 28 U.S.C. 1346(b)) one looks to State law to determine *whether* any claim accrues (Pet. App. 3a-4a). To be sure, this approach conflicts with that of the First Circuit in *Tessier* v. *United States*, 269 F. 2d 305.[4]

There appears to be no basis, however, for questioning the court of appeals' view that the action would in any event be barred under the law of New York. See, *e.g.*, *Borgia* v. *City of New York*, 12 N.Y. 2d 151, 237 N.Y.S. 2d 319, 187 N.E. 2d 777. This Court, of course, will "ordinarily accept the determinations of the Courts of Appeals on questions of local law * * *", *General Box Co.* v. *United States*, 351 U.S. 159, 165.

2. The fact that petitioner's remedy under the Tort Claims Act is time-barred by 28 U.S.C. 2401(b) in no way violates his constitutional rights, as he contends (Pet. 13-14); indeed, he has no right, in the absence of statute, to maintain any tort action against the United States. *Richards* v. *United States*, 369 U.S. 1, 6; *Dalehite* v. *United States*, 346 U.S. 15, 17.

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[3] *Quinton* v. *United States*, 304 F. 2d 234 (C.A. 5); *Hungerford* v. *United States*, 307 F. 2d 99 (C.A. 9).

[4] Contrary to petitioner's suggestion, there is no conflict with *Richards* v. *United States*, 369 U.S. 1.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY TO RESPONDENT'S BRIEF

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOT THE SECOND CIRCUIT

PETITIONER'S REPLY TO RESPONDENT'S BRIEF

To the Justices of the Supreme Court of the United States:

In reply to respondent's brief opposing the petition for certiorari, petitioner respectfully submits:

1. Respondent concedes (p. 3) that there is an inter-circuit conflict as to whether state or federal law determines when an action accrues within the meaning of 28 U. S. C. 2401(b), citing *Quinton* v. *U. S.*, (5 Cir.), 304 F. 2d 234 and *Hungerford* v. *U. S.* (9 Cir.), 307 F. 2d 99 as opposed to *Tessier* v. *U. S.* (1 Cir.), 269 F. 2d 305.

2. This inter-circuit conflict, now joined by the Second Circuit in the case at bar, justifies certiorari review by this Court to settle the law on this substantial federal question which also involves the public interest.

3. Respondent's assertion (p. 4, last paragraph) that petitioner's constitutional rights are not violated ignores

the well settled law that depriving a litigant of an available remedy violates his 5th Amendment rights. *Pritchard* v. *Norton*, 106 U. S. 124, 132, 1 S. Ct. 102; *Cochran* v. *Kansas*, 316 U. S. 255, 258, 62 S. Ct. 1068, 1070; *Irvin* v. *Dowd*, 359 U. S. 394, 404, 79 S. Ct. 825, 831.

Wherefore petitioner respectfully prays this Court will grant the petition herein.

Dated: New York, New York,
August 19, 1964.

Respectfully submitted,

JACOB RASSNER,
Counsel for Petitioner.